

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

TRACY DIEHM,)	8:04CV130
)	
Plaintiff,)	
)	
vs.)	
)	
CITY OF OMAHA, and the CITY OF)	
OMAHA POLICE DEPARTMENT,)	
)	
Defendants.)	

**DEFENDANT'S BRIEF
IN SUPPORT OF
MOTION TO DISMISS
DEFENDANT OMAHA
POLICE DEPARTMENT**

Prepared and Submitted By:
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This brief is submitted in support of Defendant, Omaha Police Department's, Motion to Dismiss pursuant to F.R.Civ.P. 12(b)(1) and 12(b)(6).

This matter was brought by Plaintiff alleging that the Omaha Police Department and the City of Omaha discriminated and retaliated against her by terminating her when she failed to pass her medical evaluation after she had dislocated her shoulder during the police academy.

F.R.Civ.P. 17(b) provides that the capacity of an entity to sue or be sued "shall be determined by the law of the state in which the district court is held." Under Nebraska law, the Omaha Police Department does not exist as a legal entity separate from the City. See NEB.REV.STAT. §§ 14-102.2 and 14-606; *Ways v. City of Lincoln*, 871 F.2d 750 (8th Cir. 1989)¹; see also *Ketchum v. Albuquerque Police Department*, 958 F.2d 381 (10th Cir. 1992); *Dean v. Barber*, 951 F.2d 1210 (11th Cir. 1992).

Plaintiff renamed the Police Department in her Amended Petition along with the City of Omaha. Clearly, the Police Department should be dismissed from this action.

The Omaha Police Department is not a suable entity under § 1983 as it has no legal identity apart from the City of Omaha. Therefore, Defendant, Omaha Police Department requests that the Court grant the Motion to Dismiss and dismiss the Omaha Police Department as a party to this action.

¹ Although the Court recognized that the Lincoln Police Department was not a legal entity capable of being sued, damages were assessed against it because the parties did not remove the Department as a defendant prior to the matter being submitted to a jury.

Respectfully submitted,

CITY OF OMAHA POLICE DEPARTMENT,
Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2004, I electronically filed the foregoing BRIEF INSUPPORT OF MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following: Michael Dowd, DOWD, DOWD & HOWARD, 1411 Harney Street, Suite 100, Omaha, NE 68102.

s/ Michelle Peters